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February 22, 2012

Ms. Renee Beniak
Executive Director
Michigan County Medical Care Facilities Council
935 North Washington Avenue
Lansing, MI 48906

Re: Opinion Letter on Senate Bill 884

Dear Renee:

Thank you for the opportunity to review Senate Bill No. 884 ("SB 884"). As proposed, SB 884 amends MCL §333.20155 and adds a new MCL §333.20155A which are both intended to improve the overall survey process, enhance surveyor training and increase consistency in survey findings and results, all within the federal regulations governing the long term care survey process.

Based on our review of SB 884 and the applicable State and federal rules, regulations, manuals and guidance, SB 884, as drafted, does not conflict with the federal regulations governing the survey process. Further, SB 884 does not appear to create a conflict between the Bureau of Health Systems' "dual responsibility as a contractual regulatory agent of the federal government and as the State licensing authority."

In order to arrive at the conclusions stated above, we researched and reviewed the following: SB 884; comments from Mike Pemble regarding SB 884; the Social Security Act (Sections 1819(g)(2)(C)(ii); 1919(g)(2)(E)(iii); 1919(g)(2)(C)(ii); and 1919(g)(2)(E)(iii)) with respect to standards for long term care facility surveyors; federal regulations regarding survey and certification of long term care facilities (42 CFR 488.300 et seq.); the Michigan Operations Manual; the State Operations Manual; Survey and Certification memoranda (S&C-09-50; S&C-08-14; and S&C-10-32-NH) regarding implementation of the Quality Indicator Survey ("QIS") process and surveyor training standards; and State statutes regarding surveyor training.

If you have any questions or would like to further discuss the proposed legislation, please feel free to contact me at your convenience.

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Troy, Michigan 48084
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December 13, 2011

Senator Goeff Hansen
420 Farnum Building
P.O. Box 30036
Lansing, MI 48909-7536

Re: Proposed amendment to Section 20155 of the Public Health Code, MCL
§333.20155

Dear Senator Hansen:

Our firm is legal counsel to the Health Care Association of Michigan, which is the state's largest trade association representing nursing facilities. HCAM CEO David Lalumia and Vice President of Government Services Melissa K. Samuel have shared with me copies of the latest "Draft 2" of the bill, as well as the comments to same submitted by the Bureau of Health Systems ("BHS").

The BHS' comments, in several places, argue that the proposed amendment (as well as some of the already existing legislation) would be in violation of the provisions of the federal Social Security Act and CMS regulations governing the survey process. My review of the proposed amendments to MCL §333.20155 does not lead me to believe that the bill would violate these federal requirements. The bill merely seeks to ensure better consistency in the survey process, acting within the federal requirements.

I would be happy to answer any questions you or your staff may have related to the bill.

Sincerely,

LEBENBOM & ROTHMAN, P.C.

Andrew R. Rothman

Cc: David Lalumia
Melissa K. Samuel

HARM OR POTENTIAL HARM PER DAY CMP – DOUBLE G OR MULTIPLE G'S

S E V E R I T Y	Actual Harm, but no Immediate Jeopardy	G \$100	H \$200 SQC \$150	I \$250 SQC \$200
	No Actual Harm but Potential for more than Minimal Harm but no Immediate Jeopardy	D \$50	E \$100	F \$200 SQC \$150
	No Actual Harm but Potential for no more than Minimal Harm	A No Remedies	B No Remedies	C No Remedies
	Scope	Isolated	Pattern	Widespread

Circle base amount and number of all that apply, add detail (if necessary), e.g., dates of prior repeat citations, prior CMP amounts

1. A civil money penalty may be assessed for any Level 2 or higher deficiency, (see S.O.M. Section 7516) but should primarily be assessed for F-SQC or Harm deficiencies, and Level 2 deficiencies following removal of an IJ.
2. Facilities will not be given an opportunity to correct (daily CMP's will be imposed) when they have deficiencies of actual harm or above on a current survey and on the previous standard survey or any intervening survey; or they have two or more actual harm or SQC citations at the current survey.
3. The total civil money penalties assessed cannot exceed \$3,000 per day; or \$10,000 per instance.
4. To determine the CMP amount for continued noncompliance following an IJ removal, base the CMP amount on the highest S/S citation remaining.
5. Add \$50 per day or \$500 per instance to the base penalty amount if the noncompliance is a repeat citation or same regulatory grouping at F-SQC or harm, or ANY IJ citation within the last 24 months, two annual survey periods. Like amounts should be added for each repeating deficiency at F-SQC or harm, or ANY IJ citation. For a third repeat, consider adding DIT, DPOC, or discretionary DPNA.
6. Add \$50 per day or \$500 per instance to the base penalty amount, based on the degree of culpability of the facility; i.e. if the noncompliance is intentional, or a product of neglect, indifference or disregard.
7. If revisit citations or new citations in same enforcement cycle increase number of citations and scope and severity to harm or F-SQC or higher, impose CMP based on new harm or SQC cites or add \$50 to existing daily CMP amount.
8. Add \$50 per day or \$500 per instance for each survey event resulting in high numbers of citations at level 2 or higher (more than 15 cites) at the last two standard surveys, intervening surveys, or current survey.
9. If a previous cycle within the last 24 months or 2 previous standard surveys included a daily CMP, then BHS will recommend at least the same daily CMP for failure to maintain compliance, if current cites are F-SQC or Harm.
10. In addition to any CMP amounts calculated, BHS may recommend imposition of discretionary DPNA when 3 or more G level (or higher) citations are issued in a 12-month period or for failure to maintain compliance.

THIS CIVIL MONEY PENALTY (CMP) SCHEDULE CONFORMS TO 42 CFR 488.408. THIS SCHEDULE IS INTENDED TO COVER THE MAJORITY OF CASES WHERE THE STATE AGENCY RECOMMENDS CMP IMPOSITION. SITUATIONS MAY ARISE THAT JUSTIFY DEPARTURE FROM THESE GUIDELINES.

Revised 04/09/07; 08/16/07; 11/30/11

Facility Name _____

Total amount of CMP / PI CMP \$ _____

Lo/Analyst Name _____

Survey Exit Date _____

IMMEDIATE JEOPARDY - Per Instance Civil Money Penalty

S E R I O U S I J U R Y	Death	\$10,000	\$10,000	\$10,000
	Serious Harm, Serious Injury, Impairment	\$5000	\$6000	\$8000
	Likely to cause Serious Harm, Serious Injury, Impairment, or Death	J \$3500	K \$4000	L \$4500
	Scope	Isolated	Pattern	Widespread

IMMEDIATE JEOPARDY - Per Day Civil Money Penalty

S E R I O U S I J U R Y	Death	\$10,000	\$10,000	\$10,000
	Serious Harm, Serious Injury, Impairment	\$4000	\$6000	\$10,000
	Likely to cause Serious Harm, Serious Injury, Impairment, or Death	J \$3050	K \$3500	L \$4000
	Scope	Isolated	Pattern	Widespread

Circle base amount and number of all that apply, add detail (if necessary), e.g. dates of prior repeat citations, prior CMP amounts

Per Day / Per Instance CMP's for IJ

1. Minimum per day and per instance assessment is \$3,050; maximum assessment is \$10,000. (SOM PICMP minimum is \$1,000; CMS will not approve less than \$3,050 PICMP)
2. Add \$1000 if current Immediate Jeopardy (IJ) citation is repeat at F-SQC, "Harm" level or above within last 12 months.
3. Add \$1000 for facility culpability; if facility non-compliance was intentional, or a product of neglect, indifference, or disregard.
4. Add \$250 for each harm and F-SQC level citation within the last 24 months, two annual survey periods.
5. Add \$500 for each IJ citation within the last 24 months, two annual survey periods.
6. Two or more IJ cites – if they are based on same example use only one citation as a basis for the CMP.
7. Two or more IJ cites – if they are not same example calculate the CMP's separately for each citation, then add the two amounts together (maximum is \$10,000).
8. Once the IJ is removed, but deficiencies remain uncorrected, use the NON IJ chart for determination of the continuing per day CMP.
9. **\$10,000 for a death when action or inaction by the facility may have caused or contributed to the death of a resident.**

Consider using PI CMP for any of the following:

1. When the beginning date of the deficiency cannot be determined.
2. When a civil money penalty is combined with other enforcement actions such as a discretionary denial of payment, directed plan of correction, or directed in-service.

THIS CIVIL MONEY PENALTY (CMP) SCHEDULE CONFORMS TO 42 CFR 488.408. THIS SCHEDULE IS INTENDED TO COVER THE MAJORITY OF CASES WHERE THE STATE AGENCY RECOMMENDS CMP IMPOSITION. SITUATIONS MAY ARISE THAT JUSTIFY DEPARTURE FROM THESE GUIDELINES.

Facility Name _____

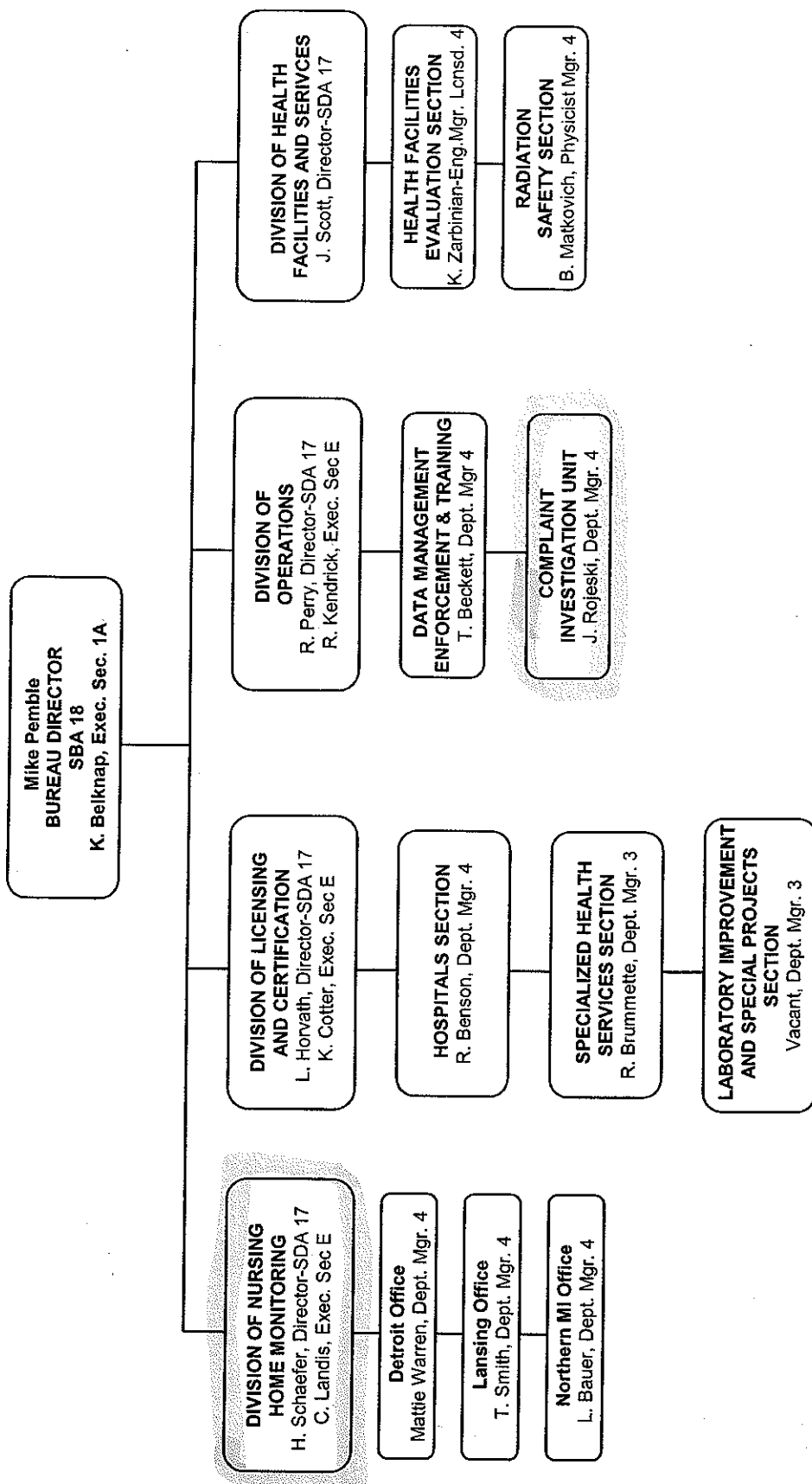
Total amount of CMP / PI CMP \$ _____

Lo/Analyst Name _____

Survey Exit Date _____

DEPARTMENT OF LICENSING & REGULATORY AFFAIRS

Bureau of Health Systems



Remedies Imposed by Region V States
FY 2011

Per Day CMPs	Total Amount Imposed	Number of Cases with an Imposed Per Day CMP
Illinois	\$2,095,800	203
Indiana	\$1,044,950	101
* Michigan	\$9,206,650	396
Minnesota	\$31,650	3
Ohio	\$2,209,800	57
Wisconsin	\$1,189,900	76

Per Instance CMPs	Total Amount Imposed	Number of Cases with an Imposed Per Instance CMP
Illinois	\$136,999	34
Indiana	\$43,700	13
Michigan	\$272,350	102
Minnesota	\$81,400	34
Ohio	\$332,800	88
Wisconsin	\$124,100	34

Denial of Payment for New Admissions (DOPNA)	Number in Effect	Number of Cases Where DOPNA was Imposed
Illinois	36	279
Indiana	17	221
* Michigan	66	547
Minnesota	5	89
Ohio	7	283
Wisconsin	13	124

Source: ASPEN Enforcement Manager Reports, run November 2011